CHAPTER 1

Perspectives; Early Doctrines; Current Applications

SECTION

SECTION 1:1 INTRODUCTION: PERSPECTIVES

In the United States, the relationship of employer and employee is a contractual one. If the employment contract does not have a definite duration, it is terminable at will. Under this **employment-at-will doctrine**, the employer historically was free to hire or not hire, and free to discharge any employee for any reason or no reason. The employee was free to leave his or her employment at any time for any reason. Gradually, federal and state statutes were enacted to provide certain individual rights to workers, protecting them from workplace exploitation and discrimination by employers. Absent this statutory protection, however, or a narrow court-created contract or tort exception, the employment-at-will doctrine is still the basic default rule governing employment in the United States.

A separate set of rules governs the negotiation and enforcement of **collective bargaining contracts** between unions and employers, as developed under the Railway Labor Act and the National Labor Relations Act.[1]

[1] Collective bargaining contracts govern the rights and obligations of employers and employees subject to these contracts. Under collective bargaining, representatives of the employees bargain with a single employer or a group of employers for an agreement on wages, hours, and working conditions. The agreement worked out by the representatives of the employees, usually union officials, is generally subject to a ratification vote by the employees. Terms usually found in collective bargaining contracts are (1) identification of the work belonging exclusively to designated classes of employees; (2) wage and benefit clauses; (3) promotion and layoff clauses, which are usually tied in part to seniority; (4) a management's rights clause; and (5) a grievance-arbitration procedure. A grievance-arbitration procedure provides a means by which persons claiming that the contract was violated or that they were disciplined or discharged without just cause may ultimately have their cases decided by impartial labor arbitrators.

The federal statutes affecting employment relations covered in this book are:

- The Railway Labor Act of 1926 as amended (RLA), which regulates the rights of individuals to form unions and engage in collective bargaining in the railway and airline industries.
- The National Labor Relations Act of 1935 (NLRA) and the Labor Management Relations Act of 1947 (LMRA), which govern the rights of individuals in the private sector to form and join labor unions and to engage in collective bargaining.
- The Fair Labor Standards Act of 1938 (FLSA), which sets minimum wages and regulates overtime pay and child labor.
- The Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), which regulates the relationship between labor unions and their members and provides a bill of rights for union members.
- The Equal Pay Act of 1963 (EPA), which prohibits gender-based compensation differentials for work requiring equal skill, effort, and responsibility.
- Title VII of the Civil Rights Act of 1964, as amended in 1972 and 1991, which prohibits discrimination in employment on account of race, color, religion, national origin, or sex.
- The Age Discrimination in Employment Act of 1967, as amended (ADEA), which prohibits discrimination in employment on account of age.
- The Occupational Safety and Health Act of 1970 (OSHA), which seeks to assure all workers safe and healthful working conditions.
- The Rehabilitation Act of 1973, which requires the federal government as an employer to implement affirmative action plans on behalf of employees with disabilities, and also requires federal contractors to take affirmative action to employ individuals with disabilities.
- The Employee Retirement Income Security Act of 1974 (ERISA), which sets vesting rights, fiduciary and administrative standards, and reporting requirements for employee pension and benefit plans.
- The Pregnancy Discrimination Act of 1978 (PDA), which amended Title VII of the Civil Rights Act of 1964, prevents employers from treating pregnancy, childbirth, and related medical conditions in a manner different from other medical conditions, and provides protection from adverse employment action because of pregnancy.
- The Immigration Reform and Control Act of 1986 (IRCA), which protects lawful aliens against discrimination because of their national origin or citizen status.
- The Employee Polygraph Protection Act of 1988 (EPPA), which generally protects private-sector job candidates and employees from being subjected to lie detector tests.
- The Worker Adjustment and Retraining Notification Act of 1988 (WARN Act), which requires employers with 100 or more employees to give 60 days'

notice of plant closings if 50 or more workers at one site are to lose their jobs; it also has a mass layoff provision.

- The Americans with Disabilities Act of 1990 (ADA), which prohibits discrimination in employment on account of disability. The ADA Amendments Act of 2008 (ADAAA) states that the definition of *disability* shall be construed in favor of broad coverage to individuals under the ADA, to the maximum extent possible.
- The Older Workers Benefit Protection Act of 1990 (OWBPA), which amended the ADEA, prohibits age discrimination in employee benefits.
- The Family and Medical Leave Act of 1993 (FMLA), which requires covered employers to provide eligible employees with up to 12 weeks of unpaid leave for certain family and medical reasons.
- The Uniformed Services Employment and Reemployment Rights Act of 1994, which protects civilian job rights of individuals who leave their jobs for active military service.
- The Health Insurance Portability and Accountability Act of 1998 (HIPAA), which holds health care providers and their employees to strict privacy standards regarding individually identifiable health information in any form.
- The Sarbanes-Oxley Act of 2002 (SOX), which contains protections for employee corporate whistleblowers who provide information regarding mail, wire, bank, or securities fraud; any violation of an SEC rule; or any federal law protecting shareholders against fraud.
- The Genetic Information Nondiscrimination Act of 2008 (GINA), which provides protection for employees against discrimination in employment on the basis of genetic information. "Company doctors" administering medical examinations must not ask for DNA tests or family medical histories.
- The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank), which expands whistleblower protections to a wide range of financial services employees, and provides bounties to whistleblowers on monetary recoveries that aggregate to more than $1 million.

The states also have a very important role in the regulation of employment relationships between employers and employees. Among other things, they administer unemployment compensation insurance programs, regulate workers' compensation programs, and set public policy regarding the termination of at-will employees and state and local government employee collective bargaining rights.

The Unionized Workforce

The decline in the number of unionized workers in the United States is seen by some as a reason to deemphasize the study of labor relations law. It is true that since 1983, the first year for which comparable union data are available, the percentage of U.S. workers belonging to unions has shrunk from 20.1 percent of the nation's workforce to approximately 10.5 percent (in 2018). The highly unionized blue-collar sectors of our economy, including manufacturing, mining, and transportation, have suffered employment declines, often due to improved labor-saving technology. This decline has adversely affected the percentage of unionized workers in

the United States. However, approximately 16.7 percent of our nation's transportation and 20.1 percent of our utility workers continue to be represented by unions, along with 15.4 percent of telecommunication workers. Some 36.9 percent of all employees in federal, state, and local government service are union members. Labor has not been very successful in organizing so-called white-collar workers, such as clerical, professional, technical, sales, and other such employees. Musicians, actors, and professional athletes are highly unionized, and many college faculty members, engineers, physicians, and nurses are unionized. About 14.7 million U.S. workers belonged to unions in 2018; some 1.7 million other workers are represented by unions even though they are not union members, and many other millions of U.S. workers receive wage and benefit adjustments comparable to or in excess of union wage rates and benefits because their employers track and pay differentials so as to avoid the unionization of their companies.[2]

Importance and Complexity of Labor Laws

Labor relations laws do not apply only to unionized employers. *All* employers that meet appropriate jurisdictional requirements are subject to federal labor laws, and their employees have the right to form and join labor unions. The employers are obligated to bargain with union representatives if a majority of the employees in an appropriate bargaining unit choose such representation.

A narrow, summary treatment of United States labor laws is of some informational value to students of management, human resources, and economics. However, our labor laws are quite complex. Since enactment of the Railway Labor Act in 1926, to the present, the courts have been called on to resolve constantly developing and very difficult policy questions in labor relations law. Often labor law decisions involve the interaction of several laws, including antitrust, anti-injunction, and labor relations law, as presented in the *Brady v. National Football League* decision reported in this chapter. However, when considered category by category and case by case, the elements of complex legal doctrines become clear and understandable.

UNIONIZED EMPLOYERS. Employers cannot threaten, coerce, or restrain employees in the exercise of their statutory rights under the NLRA, including their right to strike. Employers have the broad right to manage their business as they see fit, subject to the terms of their collective bargaining agreement(s), if one or more exist.

When negotiations for a new collective bargaining agreement leads to a valid bargaining impasse between the parties, the employer can implement its "final offer" at that point—known as the "implement upon impasse doctrine." In the *Carey Salt Co. v. NLRB* decision, presented in Chapter 5, the employer, frustrated with a lack of acceptance of its core demands by a union, with the guidance of legal counsel, implemented its "final offer" even though the union was seeking mediation and/or further bargaining. In the *Island Architectural Woodwork, Inc.* v. *NLRB* decision also presented in Chapter 5, the owner of "Island" failed to apply the collective bargaining agreement to his adjoining "Verde" shop, but the National Labor Relations Board found that Verde was the *alter-ego* of Island, with identity of business purpose, operations and equipment, substantial control by Island's CEO and an anti-union motive. The Board has the tools, including subpoena powers to require the production books, emails and documents to make informed decisions. In *Carey Salt* an e-mail from the CEO to the HR vice president exposed Carey Salt's unlawful implement upon impasse action, which led to an unfair labor practice strike, and very substantial adverse economic damage to the company. In

[2] For the latest information on union membership, see www.bls.gov/news.release/union2.toc.htm.

the *Island* case, where it was asserted that Verde was an independent employer, all the documents tending to prove that status were written up only in response to the General Counsel's subpoena. The Board held that Island had committed unfair labor practices and assessed an appropriate remedy.

The president of the Louis of Boston clothing store decided to contract out the alteration work formerly performed by in-house tailors. She believed that she had the legal right to outsource the work and lay off the employees at the expiration of the store's collective bargaining contract with the Needles Trades union. As will be seen in Chapter 5, labor law is not that simple, and an employer's bargaining obligation does not end at the expiration of the contract. After consulting with an employment law attorney and following 19 days of intermittent protests and adverse publicity, Louis of Boston issued an apology for not having followed the letter and spirit of the law and reinstated its nine tailors with back pay.

NONUNION EMPLOYERS. The owner of the famous Boathouse restaurant in New York City's Central Park terminated more than 30 employees who had petitioned for union recognition. These employees—waiters, bartenders, and busboys—were employees at will. The restaurant's management believed that it had not violated any labor laws in dismissing them as it saw fit. However, with the NLRB about to issue a far-reaching complaint of labor law violations, the restaurant offered to return all of the fired employees to work, with back wages, and to negotiate a collective bargaining contract with the Hotel Trades Council union. Nonunion employers need to know that employees who form or are forming a labor organization are protected under the National Labor Relations Act against discharge or other adverse employer actions in retaliation for the employees' union activities.

Faced with employee discontent about changes in the company's pay and benefit policies implemented due to adverse economic conditions, and later aware that a union was initiating an organizing campaign, the president of Electromation Inc. set up company action committees with company-selected employee representatives to seek solutions to the numerous problems affecting employees. The NLRB decided that the president had formed an illegal labor organization and usurped his employees' legally protected right to bargaining representation of their own choosing.

Employee and management cooperation is very important in today's global economy. Whether it is a nonunion or union company, thorough knowledge of the intricacies of labor relations law is essential in setting up lawful employee-management teams. The extent of management rights in this regard is presented in Chapter 5.

Antidiscrimination Laws

Employment discrimination based on race, color, religion, national origin, gender, age, or disability is both unacceptable and illegal in our society.

The EEOC's Systemic Class Action Program has been successful in pursuing discrimination cases affecting large classes of individuals under every statute enforced by the agency. For example, the EEOC settled a lawsuit against Bass Pro Outdoor World, LLC for over $10 million for alleged failure to recruit or hire racial minorities for positions in its retail stores.[3] The Office of Federal Contract Compliance Programs (OFCCP), with the

[3] See *EEOC v. Bass Pro Outdoor World, LLC*, 826 F.3d 791 (5th Cir. 2016). The case subsequently settled for over $10 million. EEOC Press Release, *Bass Pro to Pay $10.5 Million to Settle EEOC Hiring Discrimination and Retaliation Suit* (Jul. 25, 2017), https://www.eeoc.gov/eeoc/newsroom/release/7-25-17b.cfm.

responsibility to implement equal opportunity in the federal procurement area aggressively pursues compliance. For example, it has filed a lawsuit against Oracle America Inc. for impermissibly denying equal employment opportunity to non-Asian applicants for employment, preferring a workforce that it can later underpay. Oracle maintains the lawsuit is meritless.[4]

The #MeToo movement has raised public awareness of the prevalence of sexual harassment in the workplace. In 2018 the EEOC reported that sexual harassment charges increased by 13.6%. And the #MeToo movement has also led to legislation in some states and new policies in private industry.

Despite the plaintiff-positive headlines that come from successful settlements and trials, often reported in the press, employment discrimination plaintiffs are doing poorly in federal courts, whether before trial, at trial, or on appeal. In a 2009 article published in the *Harvard Law & Policy Review*, the authors' findings showed that the win rate for federal trial court plaintiffs over the period from 1979 to 2006 was 15 percent in job discrimination cases, whereas the win rate in all other civil cases was 51 percent.[5] In the period from 1998 to 2006, the win rate for Title VII cases was 10.9 percent—and there was a breathtaking drop of nearly 40 percent in the number of discrimination cases filed in the federal district courts from 1999 to 2007.[6]

In general, employers have become more careful to avoid discriminatory behavior. Moreover, employers are generally quick to settle discrimination charges prior to litigation when there is credible evidence of discrimination, lest they be exposed to adverse publicity and what they perceive as the possibility of runaway jury awards. The litigation hurdles in pretrial procedures (covered in Chapter 2), coupled with the low chances of success in federal courts, may very well dissuade attorneys from taking on discrimination cases and in part explain the remarkable drop in the number of lawsuits filed in federal courts.[7] The materials in this book's employment discrimination chapters (chapters 12–15) provide students with a framework for the individualized evaluation of cases involving discrimination based on race, color, religion, national origin, sex, age, and disability, which will serve them well as future managers and human resources professionals, and enable them to take corrective action when discrimination is found to have occurred and defensive action when groundless claims of discrimination are raised.

OTHER LABOR AND EMPLOYMENT LAWS. The major federal labor-employment laws identified previously in this section are continuously developing, as issues are addressed and sometimes readdressed by administrative agencies and the courts, and to some degree reflect the political and economic climate of our time. Every chapter of this text contains new precedents and issues on chapter subject matter.

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[4] The technology and financial sectors are also subject to the pay directive. The OFCCP has reached settlements with technology companies such as Dell EMC and Palandir and is engaged in litigation with Google and JP Morgan Chase. Chris Opfer and Page Smith, *Oracle Owes $400M to Women, Black, Asian Workers, DOL Says*, DLR, Bloomberg Law (Jan. 22, 2019).

[5] Kevin Clermont & Stewart Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse*, 3 HARVARD L. & POL'Y REV. 3, 30 (2009). See also Michelle Weldon, *It's Everywhere: In Employment Discrimination, the Law Usually Wins, Not You*, Huffington Post, October 8, 2017.

[6] Clermont & Schwab, *supra* note 5, at 41.

[7] Some of the decline can also be attributed to the mandatory arbitration of statutory discrimination claims increasingly required in initial employment contracts.

SECTION 1:2 HISTORICAL CONTEXT: THE CRIMINAL CONSPIRACY DOCTRINE

The first recorded American labor relations case took place in Philadelphia and involved a criminal proceeding in 1806 against eight members of a guild of bootmakers and shoemakers (cordwainers) who had gone on strike against their employers: *Commonwealth v. Pullis*. The employer group of masters asked the jury to establish the principle that the strike of the guild members was a criminal conspiracy in restraint of trade. The cordwainers were charged with (1) mutually agreeing to refuse to work for an employer who paid less than a fixed rate (which was higher than what had customarily been paid), (2) agreeing to try to prevent other craftsmen from working except at this rate, and (3) agreeing not to work for anyone who employed a cordwainer who had broken the guild's rules. The jury found the defendants guilty, and the court fined each defendant $8.

In the landmark 1842 decision *Commonwealth v. Hunt,* written by Chief Justice Lemuel Shaw of the Massachusetts Supreme Judicial Court, the court refuted, but did not squarely repudiate, the criminal conspiracy doctrine. Several members of the Boston Journeymen Bootmakers Society had been convicted of criminal conspiracy to withhold their services from an employer until such time as the employer discharged a journeyman named Jeremiah Horne, because Horne was not a member of the Bootmakers Society. The conviction was appealed, and the appeals court ruled that it was not an invalid purpose for the society to induce all those engaged in the same occupation to become members of the society. According to the court, the legality of unions depended on their purpose and the means by which the purpose was carried out.

CASE 1.1

COMMONWEALTH V. PULLIS (PHILADELPHIA CORDWAINERS' CASE OF 1806)

Philadelphia Mayor's Court, 3 Commons and Gilmore.

[From the judge's charge to the jury.] What is the case now before us? . . . A combination of workmen to raise their wages may be considered in a twofold point of view: one is to benefit themselves [and] the other is to injure those who do not join their society. The rule of law condemns both. If the rule be clear, we are bound to conform to it even though we do not comprehend the principle upon which it is founded. We are not to reject it because we do not see the reason of it. It is enough, that it is the will of the majority. It is law because it is their will—if it is law, there may be good reasons for it though we cannot find them out. But the rule in this case is pregnant with sound sense and all the authorities are clear upon the subject. Hawkins, the greatest authority on the criminal law, has laid it down, that a combination to maintaining one another, carrying a particular object, whether true or false, is criminal. . . .

In the profound system of law, (if we may compare small things with great) as in the profound systems of Providence . . . there is often great reason for an institution, though a superficial observer may not be able to discover it. If obedience alone is required in the present case, the reason may be this. One man determines not to work under a certain price and it may be individually the opinion of all: in such a case it would be lawful in each to refuse to do so, for if each stands, alone, either may extract from his determination when he pleases. In the turnout of last fall, if each member of the body had stood alone, fettered by no promises to the rest, many of them might have changed their opinion as to the price of wages and gone to

work; but it has been given to you in evidence, that they were bound down by their agreement, and pledged by mutual engagements, to persist in it, however contrary to their own judgment. The continuance in improper conduct may therefore well be attributed to the combination. The good sense of those individuals was prevented by this agreement, from having its free exercise. . . . Is it not restraining, instead of promoting, the spirit of '76 when men expected to have no law but the Constitution, and laws adopted by it or enacted by the legislature in conformity to it? Was it the spirit of '76, that either masters or journeymen, in regulating the prices of their commodities should set up a rule contrary to the law of their country? General and individual liberty was the spirit of '76. It is our first blessing. It has been obtained and will be maintained. . . . Though we acknowledge it is the hard hand of labour that promises the wealth of a nation, though we acknowledge the usefulness of such a large body of tradesmen and agree they should have everything to which they are legally entitled; yet we conceive they ought to ask nothing more. They should neither be slaves nor the governors of the community.

The sentiments of the court, not an individual of which is connected either with the masters or journeymen; all stand independent of both parties . . . are unanimous. They have given you the rule as they have found it in the book, and it is now for you to say, whether the defendants are guilty or not. The rule they consider as fixed, they cannot change it. It is now, therefore, left to you upon the law, and the evidence, to find the verdict. If you can reconcile it to your consciences, to find the defendants not guilty, you will do so; if not, the alternative that remains, is a verdict of guilty.

[The jury found the defendants guilty of combining and conspiring to raise their wages, and the penalty was a fine of eight dollars for each defendant.]

CASE QUESTIONS

1. How did the court view the combination of workers with respect to their intent?
2. Did the court find the continuance of the withholding of labor attributable to a combination?

CASE 1.2 COMMONWEALTH V. HUNT

Supreme Judicial Court of Massachusetts, 4 Metcalf 111, 38 Am. Dec. 346 (1842).

SHAW, C. J. . . .

The general rule of the common law is that it is a criminal and indictable offense for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law, in England and in this commonwealth; and yet it must depend upon the local laws of each country to determine whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries. . . . Without attempting to review and reconcile all the cases, we are of the opinion, that as a general description, though perhaps not a precise and accurate definition, a conspiracy must be a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. . . .

The averment is this: that the defendants and others formed themselves into a society and agreed not to work for any person who should employ any journeyman or other person not a member of such society after notice given him to discharge such workman.

The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness, and distress; or to raise their intellectual, moral, and social condition; or to make improvement in their art; or for other proper purposes. Or the association might be designed for purposes of oppression and injustice. But in order to charge all those who become members of an association with the guilt of criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association was criminal. An association may be formed, the declared objects of which are innocent and laudable, and yet they may have secret articles, or an agreement communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy, on proof of the fact, however meritorious and praiseworthy the declared objects might be. The law is not to be hoodwinked by colorable pretenses. It looks at truth and reality, through whatever disguise it may assume. But to make such an association, ostensibly innocent, the subject of prosecution as a criminal conspiracy, the secret agreement which makes it so, is to be averred and proved as the gist of the offense. But when an association is formed for purposes actually innocent, and afterward its powers are abused by those who have the control and management of it, to purposes of oppression and injustice, it will be criminal in those who thus misuse it, or give consent thereto, but not in the other members of the association. In this case, no such secret agreement, varying the objects of the association from those avowed, is set forth in this count of the indictment.

Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they proposed to employ, as averred in this count, and which, as we are not to presume, were established by the proof, were, that they would not work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work, if they so prefer. In this state of things, we cannot perceive that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests. One way to test this is to consider the effect of such an agreement, where the object of the association is acknowledged on all hands to be a laudable one. Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop in which any one used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it. The consequences might be the same. A workman who should still persist in the use of ardent spirit, would find it more difficult to get employment; a master employing such a one might at times, experience inconvenience in his work, in losing the services of a skillful but intemperate workman. Still it seems to us, that as the object would be lawful, and the means not unlawful, such an agreement could not be pronounced a criminal conspiracy. . . .

We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and

profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public-spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. . . .

Several other exceptions were taken, and have been argued; but this decision on the main question has rendered it unnecessary to consider them.

It *is so ordered.*

CASE QUESTIONS

1. What was the "manifest intent" of the labor organization in the case?
2. How does the court define a criminal conspiracy?
3. State the rule of law developed by the court.

SECTION 1:3 HISTORICAL CONTEXT: THE CONTRACTUAL INTERFERENCE DOCTRINE

The weapons used by organized labor in the 1870s, 1880s, and 1890s to obtain recognition and economic gains were picketing, strikes, and boycotts. Some employers responded with professional strikebreakers and blacklists. Employers also turned to the courts and sought and obtained injunctions against picketing, boycotts, and strike activities. The *Vegelahn v. Guntner* decision, including the dissenting opinion of Justice Oliver Wendell Holmes, then on the Massachusetts Supreme Judicial Court, is presented in this section. In *Vegelahn,* the union engaged in picketing in front of the employer's business to try to persuade current employees and job applicants not to enter the business, and it sought to persuade individuals to break their employment contracts with the employer. The court enjoined this conduct.

With acceptance of the interference with contractual relations theory by the judiciary, employers often obtained a written pledge from each worker that in exchange for employment, the worker agreed not to join a union during the period of his or her employment. Such contracts were called **yellow-dog contracts**, with connotations of animal servitude as opposed to human dignity. In the *Hitchman Coal & Coke v. Mitchell* case decided in 1917, the Supreme Court upheld an injunction against a union, prohibiting it from interfering with the yellow-dog contracts in effect at two coal mines. The *Hitchman* precedent served as a model for other employers at that time to adopt similar contractual relations with their employees as a means of union avoidance.

Yellow-dog contracts were outlawed by Section 2(5) of the Railway Labor Act of 1926 and Section 3 of the Norris-LaGuardia Act of 1932.

CASE 1.3 VEGELAHN V. GUNTNER

Supreme Judicial Court of Massachusetts, 167 Mass. 92, 44 N.E. 1077 (1896).

ALLEN, J. . . .

The principal question in this case is whether the defendants should be enjoined against maintaining the patrol. The report shows that, following upon a strike of the plaintiff's workmen, the defendants conspired to prevent him from getting workmen and thereby to prevent him from carrying on his business, unless and until he should adopt a certain schedule of prices. The means adopted were persuasion and social pressure, threats of personal injury or unlawful harm conveyed to persons employed or seeking employment, and a patrol of two men in front of the plaintiff's factory, maintained from half past 6 in the morning till half past 5 in the afternoon, on one of the busiest streets of Boston. The number of men was greater at times, and at times showed some little disposition to stop at the plaintiff's door. The patrol proper at times went further than simple advice not obtruded beyond the point where the other person was willing to listen; and it was found that the patrol would probably be continued if not enjoined. There was also some evidence of persuasion to break existing contracts. The patrol was maintained as one of the means of carrying out the defendant's plan, and it was used in combination with social pressure, threats of personal injury or unlawful harm, and persuasion to break existing contracts. It was thus one means of intimidation, indirectly to the plaintiff, and directly to persons actually employed, or seeking to be employed, by the plaintiff, and of rendering such employment unpleasant and intolerable to such persons.

Such an act is an unlawful interference with the rights of both the employer and of the employed. An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them. These rights are secured by the [C]onstitution itself. . . .

The defendants contend that these acts were justifiable because they were only seeking to secure better wages for themselves by compelling the plaintiff to accept their schedule of wages. This motive or purpose does not justify maintaining a patrol in front of the plaintiff's premises, as a means of carrying out their conspiracy. A combination among persons merely to regulate their own conduct is within allowable competition, and is lawful, although others may be indirectly affected thereby. But a combination to do injurious acts expressly directed to another, by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition, and is unlawful. . . . We therefore think that the injunction should be in the form originally issued.

So *ordered.*

HOLMES, J. (dissenting) . . .

One of the eternal conflicts out of which life is made up is that between the efforts of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way. . . .

If it be true that workingmen may combine with a view, among other things, to getting as much as they can for their labor, just as capital may combine with a view to getting the greatest possible return, it must be true that, when combined, they have the same liberty that combined capital has, to support their interest by argument, persuasion, and the bestowal or

refusal of those advantages which they otherwise lawfully control. I can remember when many thought that, apart from violence or breach of contract, strikes were wicked, as organized refusals to work. I suppose that intelligent economists and legislators have given up that notion today. I feel pretty confident that they equally will abandon the idea that an organized refusal by workmen of social intercourse with a man who shall enter their antagonist's employ is unlawful, if it is disassociated from any threat of violence, and is made for the sole object of prevailing, if possible, in a contest with their employer about the rate of wages. The fact that the immediate object of the act by which the benefit to themselves is to be gained is to injure their antagonist does not necessarily make it unlawful, any more than when a great house lowers the price of goods for the purpose and with the effect of driving a smaller antagonist from the business. . . .

CASE QUESTIONS

1. Was the picketing peaceful or tainted with violence?
2. What was the scope of the court's injunction?
3. In his classic dissent, how does Justice Holmes justify the infliction of injury by a labor organization?

CASE 1.4 HITCHMAN COAL & COKE CO. V. MITCHELL

Supreme Court of the United States, 245 U.S. 229 (1917).

PITNEY, J. . . .

This was a suit in equity, commenced October 24, 1907, in the United States Circuit (afterwards District) Court for the Northern District of West Virginia, by the Hitchman Coal & Coke Company, against certain officers of the United Mine Workers of America. . . .

Plaintiff owns about 5,000 acres of coal lands situated at or near Benwood, in Marshall county, West Virginia, and within what is known as the "Panhandle District" of that state, and operates a coal mine thereon employing between 200 and 300 men, and having an annual output, in and before 1907, of about 300,000 tons. At the time of filing of the bill, and for a considerable time before and ever since, it operated its mine "nonunion," under an agreement with its men to the effect that the mine should be run on a nonunion basis, that the employees should not become connected with the union while employed by plaintiff, and that if they joined it their employment with plaintiff should cease. . . .

. . . The general object of the bill was to obtain an injunction to restrain defendants from interfering with the relations existing between plaintiff and its employees in order to compel plaintiff to "unionize" the mine. . . .

. . . On April 15, 1906, defendant Zelenka, vice-president of the subdistrict, visited the mine, called a meeting of the miners, and addressed them in a foreign tongue, as a result of which they went on strike the next day, and the mine was shut down until the 12th of June, when it resumed as a "nonunion" mine, so far as relations with the U.M.W.A. were concerned.

During this strike plaintiff was subjected to heavy losses and extraordinary expenses with respect to its business, of the same kind that had befallen it during the previous strikes.

About the 1st of June a self-appointed committee of employees called upon plaintiff's president, stated in substance that they could not remain longer on strike because they were not receiving benefits from the union, and asked upon what terms they could return to work. They were told that they could come back, but not as members of the United Mine Workers of America; that thenceforward the mine would be run nonunion, and the company would deal with each man individually. They assented to this, and returned to work on a nonunion basis. Mr. Pickett, the mine superintendent, had charge of employing the men, then and afterwards, and to each one who applied for employment he explained the conditions which were that while the company paid the wages demanded by the union and as much as anybody else, the mine was run nonunion and would continue so to run; that the company would not recognize the United Mine Workers of America; that if any man wanted to become a member of that union he was at liberty to do so; but he could not be a member of it and remain in the employ of Hitchman Company; that if he worked for the company he would have to work as a nonunion man. To this each man employed gave his assent, understanding that while he worked for the company he must keep out of the union.

Since January 1908 (after the commencement of the suit), in addition to having this verbal understanding, each man has been required to sign an employment card expressing in substance the same terms. This has neither enlarged nor diminished plaintiff's rights, the agreement not being such as is required by law to be in writing. Under this arrangement as to the terms of employment, plaintiff operated its mine from June 2, 1906, until the commencement of the suit in the fall of the following year.

During the same period a precisely similar method of employment obtained, at the Glendale mine, a property consisting of about 200 acres of coal land adjoining the Hitchman property on the south, and operated by a company having the same stockholders and the same management as the Hitchman mine; the office of the Glendale mine being at the Hitchman Coal & Coke Company's office. Another mine in the Panhandle, known as Richland, a few miles north of the Hitchman, likewise was run "nonunion."

In fact, all coal mines in the Panhandle and elsewhere in West Virginia, except in a small district known as the Kanawha field, were run "nonunion" while the entire industry in Ohio, Indiana, and Illinois was operated on the "closed shop" basis so that no man could hold a job about the mines unless he was a member of the United Mine Workers of America. Pennsylvania occupied a middle ground, only a part of it being under the jurisdiction of the union. Other states need not be particularly mentioned.

The unorganized condition of the mines in the Panhandle and some other districts was recognized as a serious interference with the purposes of the union in the Central Competitive Field, particularly as it tended to keep the cost of production low, and, through competition with coal produced in the organized field, rendered it more difficult for the operators there to maintain prices high enough to induce them to grant certain concessions demanded by the Union. . . .

What are the legal consequences of the facts that have been detailed?

That the plaintiff was acting within its lawful rights in employing its men only upon terms of continuing nonmembership in the United Mine Workers of America is not open to question. Plaintiff's repeated costly experience of strikes and other interferences while attempting to "run union" were a sufficient explanation of its resolve to run "nonunion," if any were needed. But neither explanation nor justification is needed. Whatever may be the advantages of "collective bargaining," it is not bargaining at all, in any just sense, unless it is

voluntary on both sides. . . This court repeatedly has held that the employer is as free to make nonmember-ship in a union a condition of employment as the working man is free to join the union, and that this is part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power. . . .

Defendants set up, by way of justification or excuse, the right of workingmen to form unions, and to enlarge their membership by inviting other workingmen to join. The right is freely conceded, provided the objects of the union be proper and legitimate, which we assume to be true, in a general sense, with respect to the union here in question. *Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 439. The cardinal error of defendants' position lies in the assumption that the right is so absolute that it may be exercised under any circumstances and without any qualification; whereas in truth, like other rights that exist in civilized society, it must always be exercised with reasonable regard for the conflicting rights of others. *Brennan v. United Hatters,* 73 N.J. Law. 729, 749. . . .

In any aspect of the matter, it cannot be said that defendants were pursuing their object by lawful means. The question of their intentions—of their bona fides—cannot be ignored. It enters into the question of malice. As Bowen, L. J., justly said, in the *Mogul Steamship Case,* 23 Q.B. Div. 613:

> Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.

Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are "peaceable"—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. A combination to procure concerted breaches of contract by plaintiff's employees constitutes such a violation. . . .

Upon all the facts, we are constrained to hold that the purpose entertained by defendants to bring about a strike at plaintiff's mine in order to compel plaintiff, through fear of financial loss, to consent to the unionization of the mine as the lesser evil, was an unlawful purpose, and that the methods resorted to by Hughes—the inducing of employees to unite with the union in an effort to subvert the system of employment at the mine by concerted breaches of the contracts of employment known to be in force there, not to mention misrepresentation, deceptive statements, and threats of pecuniary loss communicated by Hughes to the men—were unlawful and malicious methods, and not to be justified as a fair exercise of the right to increase the membership of the union. . . .

That the damage resulting from a strike would be irremediable at law is too plain for discussion.

As against the answering defendants, plaintiff's right to an injunction is clear; as to the others named as defendants, but not served with process, the decree is erroneous, as already stated. . . .

The decree of the Circuit Court of Appeals is reversed, and the degree of the District Court is modified as above stated. . . .

CASE QUESTIONS

1. What agreement did the Hitchman Company ask its employees to abide by?
2. At the time of this case, what states were mining coal on a closed-shop basis?
3. What is a closed shop?
4. Were the organizing efforts of the UMWA peaceful? Was this a good defense?
5. Did the Court concede that workers had the right to form and join labor organizations?
6. Did the Court uphold the yellow-dog contract?

SECTION 1:4 HISTORICAL CONTEXT: EARLY APPLICATIONS OF THE SHERMAN ACT

Labor organizations were on the defensive in the 1910s and 1920s. Not only were they subject to injunctions by the courts, but the courts also applied the antitrust laws to them. In the 1915 case of *Lawlor v. Loewe,* the Supreme Court ruled that a nationwide boycott by the hatters' union against a nonunion hat manufacturer, Dietrich Loewe, violated the antitrust laws. The Court ruled that Loewe was entitled to collect treble damages from the 248 members of the union. The Court applied Section 1 of the Sherman Act to include agreements between laborers to extend control over a labor market. Section 1 of the Act provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal." Section 7 of the Sherman Act provided the statutory basis for the damages assessed against each of the union members.

CASE 1.5 **LAWLOR V. LOEWE**

Supreme Court of the United States, 235 U.S. 522 (1915).

HOLMES, J. . . .

The substance of the charge is that the plaintiffs were hat manufacturers who employed nonunion labor; that the defendants were members of the United Hatters of North America and also of the American Federation of Labor; that in pursuance of a general scheme to unionize the labor employed by manufacturers of fur hats (a purpose previously made effective against all but a few manufacturers), the defendants and other members of the United Hatters caused the American Federation of Labor to declare a boycott against the plaintiffs and against all hats sold by the plaintiffs to dealers in other States and against dealers who should deal in them; and that they carried out their plan with such success that they have restrained or destroyed the plaintiffs' commerce with other States. The case now has been tried, the plaintiffs have got a verdict and the judgment of the District Court has been affirmed by the Circuit Court of Appeals. 209 F. 721, 126 C.C.A. 445.

The grounds for discussion under the statute have been narrowed by the case of *Eastern States Retail Lumber Dealers' Ass'n v. United States,* 234 U.S. 600. Whatever may be the law otherwise, that case establishes that, irrespective of compulsion or even agreement to observe its intimation, the circulation of a list of "unfair dealers," manifestly intended to put the ban upon those whose names appear therein, among an important body of possible customers combined with a point of view to joint action and in anticipation of such reports, is within the

prohibitions of the Sherman Act if it is intended to restrain and restrains commerce among the States.

It requires more than the blindness of justice not to see that many branches of the United Hatters and the Federation of Labor, to both of which the defendants belonged, in pursuance of a plan emanating from headquarters made use of such lists, and of the primary and secondary boycott in their effort to subdue the plaintiffs to their demands. The union label was used and a strike of the plaintiffs' employees was ordered and carried out to the same end, and the purpose to break up the plaintiffs' commerce affected the quality of the acts. *Loewe v. Lawlor,* 208 U.S. 274, 299. We agree with the Circuit Court of Appeals that a combination and conspiracy forbidden by the statute were proved, and that the question is narrowed to the responsibility of the defendants for what was done by the sanction and procurement of the societies above named.

The court in substance instructed the jury that if these members paid their dues and continued to delegate authority to their officers unlawfully to interfere with the plaintiffs' interstate commerce in such circumstances that they know or ought to have known, and such officers were warranted in the belief that they were acting in the matters within their delegated authority, then such members were jointly liable, and no others. It seems to us that this instruction sufficiently guarded the defendants' rights, and that the defendants got all that they were entitled to ask in not being held chargeable with knowledge as a matter of law. It is a tax on credulity to ask anyone to believe that members of labor unions at that time did not know that the primary and secondary boycott and the use of the "We don't patronize" or "Unfair" list were means expected to be employed in the effort to unionize shops. Very possibly they were thought to be lawful. See *Gompers v. United States,* 233 U.S. 604. By the Constitution of the United Hatters the directors are to use "all the means in their power" to bring shops "not under our jurisdiction" "into the trade." The bylaws provide a separate fund to be kept for strikes, lockouts, and agitation for the union label. Members are forbidden to sell nonunion hats. The Federation of Labor with which the Hatters were affiliated had organization of labor for one of its objects, helped affiliated unions in trade disputes, and to that end, before the present trouble, had provided in its Constitution for prosecuting and had prosecuted many what it called legal boycotts. Their conduct in this and former cases was made public especially among the members in every possible way. If the words of the documents on their face and without explanation did not authorize what was done, the evidence of what was done publicly and habitually showed their meaning and how they were interpreted. The jury could not but find that by the usage of the unions the acts complained of were authorized, and authorized without regard to their interference with commerce among the States. We think it unnecessary to repeat the evidence of the publicity of this particular struggle in the common newspapers and union prints, evidence that made it almost inconceivable that the defendants, all living in the neighborhood of the plaintiffs, did not know what was done in the specific case. If they did not know that, they were bound to know the constitution of their societies, and at least well might be found to have known how the words of those constitutions had been construed in the act. . . .

*Judgment affirmed.**

* By Section 301(b) of the National Labor Relations Act of 1947, money judgments are enforceable only against the union as an entity "and shall not be enforceable against any individual member or his assets."

CASE QUESTIONS

1. What purpose was pursued by the United Hatters?
2. What pressure methods did the American Federation of Labor and the United Hatters exert?
3. State the rule of the case.

SECTION 1:5 INJUNCTIONS AND THE CLAYTON AND NORRIS-LAGUARDIA ACTS

Understanding labor-related statutory and case materials requires familiarity with the injunctive process. An *injunction* is a mandatory or prohibitory order issued by a court of equity. An injunction is prohibitory if it orders the defendant to refrain from specified conduct; it is mandatory if it requires performance of an affirmative act. An injunction gives relief to an aggrieved party in those cases where the remedy of monetary damages is inadequate. A single injunction may have prohibitory and mandatory aspects at the same time, as when a union is concurrently ordered to refrain from violence in picketing and to bargain in good faith with the employer.

A **temporary restraining order** may be issued prior to a hearing on an injunction. It should be issued only in exceptional or urgent situations, its purpose being to maintain the status quo of the subject in dispute until a court hearing takes place. A **temporary injunction**, also called a *preliminary injunction*, is granted after a hearing (but before a full trial) and enjoins commission of the disputed acts while a court hears and studies the case on its merits. A **final injunction** is issued after a trial on the merits.

Early Judicial Tendencies

The earliest recorded issuance of a court injunction in a labor dispute dates from the 1880s. The case of *In re Debs*,[8] decided in 1895, popularized the usage of the injunction in labor cases in America. One authority has found records in state and federal courts, from 1890 to 1931, of 1,872 labor injunctions granted at employers' requests and 223 cases in which such applications for relief were denied.[9]

Courts have authority to enforce injunctions with their **contempt powers**, including the assessment of fines or imprisonment. Direct contempts that occur in a court's presence may be adjudged immediately and sanctioned summarily by the court. Except for serious criminal contempt, for which cases a jury is required, traditional distinctions between civil and criminal contempt proceedings do not pertain in direct contempt cases. A contempt fine assessed by a judge without a jury trial is considered "civil contempt" if it either coerces the defendant into compliance with a court's order or compensates for losses sustained. However, contempt involving out-of-court disobedience of complex injunctions often requires elaborate and reliable factfinding and, under those circumstances, criminal procedural protections, such as the right to counsel and proof beyond a reasonable doubt. These protections are necessary and appropriate to protect the due process rights of the parties and to prevent the arbitrary exercise of judicial power.

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[8] 158 U.S. 164 (1895).

[9] E. E. Witte, *The Government in Labor Disputes* 64 (New York: McGraw-Hill, 1932).

As applied to trespasses by labor, the employer found the injunction a keen and effective tool for the following reasons:

1. Speed of action was secured, because only affidavit proof (sworn statements in writing) had to be admitted for the court to issue a preliminary injunction, as opposed to the live testimony of witnesses under oath and subject to cross-examination.
2. Delay between issuance of the preliminary and the final injunction was often so prolonged as to ensure defeat of the strikers or picketers, notwithstanding the union's eventual success in securing dissolution of the restraining order.
3. The employer had a choice of tribunal to which to direct the plea and could select an antilabor forum, either federal or state.
4. Lack of a jury trial in equity reduced labor's chances of winning an injunction case.
5. Blanket and obscure language in the wording of some injunctions intimidated union members because of their inability to separate legal from illegal acts, as well as their inability to determine exactly what conduct was permissible and what was forbidden.

Congressional Corrections

In reaction to this situation, organized labor carried on a relentless lobbying effort in Congress to secure a narrowing of judicial injunctive power in labor cases. The first fruit of this campaign was the Clayton Antitrust Act of 1914. With this act Congress sought to substantially reenact the Sherman Antitrust Act of 1890. At the same time, it sought to withdraw the applicability of the Act to labor combinations and to divest the courts of their wide injunctive powers in labor dispute cases. Section 6 provided "that the labor of a human being is not a commodity or article of commerce . . . nor shall such [labor] organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

Section 20 imposes a statutory restriction on injunctive relief by providing that no injunction would issue in a labor dispute between employers and employees unless irreparable injury to property and property rights was threatened for which the remedy at law (damages) was inadequate. Narrow Supreme Court interpretations of the Clayton Act weakened the mandates of Sections 6 and 20, as set forth in the *Duplex v. Deering*[10] and *American Steel Foundries*[11] decisions of 1921. The courts found a path around the Act by making the exception the rule under various theories, among them that the act did not change preexisting law; did not apply where the union objective was recognition; did not apply where yellow-dog contracts were in effect; and finally, did not protect strikers because they were no longer employees.

Use of injunctions against unions became even more popular after passage of the Clayton Act, because an employer could now bring an action in a federal court as a party plaintiff. Under the Sherman Act, only the government had that power.

THE NORRIS-LAGUARDIA ACT. Disappointed by the Supreme Court's adverse construction of the Clayton Act in the *Duplex* and *American Steel Foundries* cases, organized labor intensified

[10] 254 U.S. 443 (1921).

[11] 257 U.S. 184 (1921).

its political pressure at both state and federal levels, securing passage of the Federal Anti-Injunction Act (Norris-LaGuardia Act) in 1932. This legislation effectively divested the federal courts of their equity power to issue injunctions at the behest of private parties in situations in which a bona fide labor dispute existed. The jurisdictional requirements set forth in Section 7 of the Act furnished an almost insurmountable barrier to injunctive action when coupled with Section 13 of the Act, which very broadly defined the term labor dispute to include controversies without regard to whether the relation of employer and employee existed.

In *Brady v. National Football League*, presented in this chapter, professional football players sued the National Football League and its separately owned clubs, alleging that a planned lockout by the league would constitute a group boycott and price fixing in violation of Section 1 of the Sherman Antitrust Act. The federal district court in Minnesota granted a preliminary injunction enjoining the lockout. On appeal to the Court of Appeals for the Eighth Circuit, in a 2–1 decision, the court vacated the preliminary injunction because the case invoked or grew out of a "labor dispute," and Section 4(a) of the Norris-La Guardia Act deprives federal courts of the power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout of its employees.

CASE 1.6 BRADY V. NATIONAL FOOTBALL LEAGUE

United States Court of Appeals for the Eighth Circuit, 640 F.3d 785 (8th Cir. 2011).

[The Players opted to terminate their union's status as their collective bargaining agent just before the collective bargaining agreement (CBA) expired on March 11, 2011. Later that day, the Players filed an action in district court alleging that the planned lockout by the National Football League (NFL) would constitute a group boycott and price-fixing agreement that would violate Section 1 of the Sherman Antitrust Act. The individual Players explained that they had determined that it was not in their interest to remain unionized if the existence of such a union would serve to allow the NFL to impose anticompetitive restrictions with impunity. The NFL proceeded with its planned lockout on March 12, 2011. The Players moved for a preliminary injunction in the district court, urging the court to enjoin the lockout as an unlawful group boycott that was causing irreparable harm to the Players. The district court granted a preliminary injunction, and the League appealed.]

COLLOTON, C.J. . . .

We consider first the League's contention that the Norris-LaGuardia Act deprived the district court of jurisdiction to enter the injunction. The NLGA, enacted in 1932, curtails the authority of a district court to issue injunctions in a labor dispute. "Congress was intent upon taking the federal courts out of the labor injunction business except in the very limited circumstances left open for federal jurisdiction under the Norris-LaGuardia Act." *Marine Cooks & Stewards v. Pan. S.S. Co.*, 362 U.S. 365, 369 (1960). . . .

To determine whether the NLGA forbids or places conditions on the issuance of an injunction here, we begin with the text of the statute. Section 1 provides that "[n]o court of the United States . . . shall have jurisdiction to issue any . . . temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter." 29 U.S.C. § 101. As noted, the district court concluded that the Act is inapplicable to this action, because the case is not one "involving or growing out of a labor dispute."

Section 13(c) of the Act states that "[t]he term 'labor dispute' includes *any controversy concerning terms or conditions of employment*, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee." 29 U.S.C. § 113(c) (emphasis added). This lawsuit is a controversy concerning terms or conditions of employment. The Players seek broad relief that would affect the terms or conditions of employment for the entire industry of professional football. In particular, they urge the court to declare unlawful and to enjoin several features of the relationship between the League and the players, including the limit on compensation that can be paid to rookies, the salary cap, the "franchise player" designation, and the "transition player" designation, all of which the Players assert are anticompetitive restrictions that violate § 1 of the Sherman Act. . . .

. . . Not only has the Supreme Court repeatedly characterized § 13(c) as a definition, but contrary to the suggestion that an established meaning should be used to narrow the text, the Court has observed that "the statutory definition itself is extremely broad," *Jacksonville Bulk Terminals, Inc.*, 457 U.S. at 712, and explained that "Congress made the definition broad because it wanted it to be broad." *Order of R.R. Telegraphers*, 362 U.S. at 335–36.

The Act also states expressly that "[a] case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation." 29 U.S.C. § 113(a). This case, of course, involves persons engaged in the "same industry," namely, professional football. The statute continues that such a case "shall be held to involve or grow out of a labor dispute" when "such dispute is . . . between one or more employers or associations of employers and one or more employees or associations of employees." *Id.* This dispute is between one or more employers or associations of employers (the League and the NFL teams) and one or more employees (the Players under contract). By the plain terms of the Act, this case "shall be held to involve or grow out of a labor dispute."

The district court reached a contrary conclusion by departing from the text of § 13(a). The court thought the phrase "one or more employees or associations of employees" did not encompass the Players in this dispute, because "one or more employees" means "individual *unionized* employee or employees." . . . We see no warrant for adding a requirement of unionization to the text. . . .

The text of the Norris-LaGuardia Act and the cases interpreting the term "labor dispute" do not require the present existence of a union to establish a labor dispute. Whatever the precise limits of the phrase "involving or growing out of a labor dispute," this case does not press the outer boundary. The League and the players' union were parties to a collective bargaining agreement for almost eighteen years prior to March 2011. They were engaged in collective bargaining over terms and conditions of employment for approximately two years through March 11, 2011. At that point, the parties were involved in a classic "labor dispute" by the Players' own definition. Then, on a single day, just hours before the CBA's expiration, the union discontinued collective bargaining and disclaimed its status, and the Players filed this action seeking relief concerning industry-wide terms and conditions of employment. Whatever the effect of the union's disclaimer on the League's immunity from antitrust liability, the labor dispute did not suddenly disappear just because the Players elected to pursue the dispute through antitrust litigation rather than collective bargaining. . . .

Aside from the text and structure of § 4, the Players argue that the policy of the NLGA and the legislative history support their position that § 4(a) offers no protection to employers. To be sure, the policy stated in § 2 is that the individual unorganized worker should be free

from the interference, restraint, or coercion of employers in the designation of representatives, self-organization, or other concerted activities. But it does not follow that a prohibition on injunctions against employer lockouts is contrary to the policy of the Act. The Supreme Court has observed that while the Act was designed to protect workingmen, the broader purpose was "to prevent the injunctions of the federal courts from *upsetting the natural interplay of the competing economic forces of labor and capital*." *Bhd. of R.R. Trainmen v. Chi. River & Ind. R.R. Co.*, 353 U.S. 30, 40 (1957) (emphasis added). . . .

For these reasons, we conclude that § 4(a) of the Norris-LaGuardia Act deprives a federal court of power to issue an injunction prohibiting a party to a labor dispute from implementing a lockout of its employees. This conclusion accords with the few decisions that have addressed the specific question. . . . Because the Norris-LaGuardia Act prohibits the district court from issuing an injunction against the League's lockout of employees, the court's order cannot stand. . . .

Given our conclusion that the preliminary injunction did not conform to the provisions of the Norris-LaGuardia Act, we need not reach the other points raised by the League on appeal. In particular, we express no view on whether the League's nonstatutory labor exemption from the antitrust laws continues after the union's disclaimer. The parties agree that the Act's restrictions on equitable relief are not necessarily coextensive with the substantive rules of antitrust law, and we reach our decision on that understanding. . . .

BYE, CIRCUIT JUDGE, dissenting.

In 1914, after twenty years of judicial interference in labor conflicts on the side of the employers, Congress stepped in to protect organized labor by passing sections 6 and 20 of the Clayton Act. Section 20 of the Act generally prohibited the issuance of injunctions in cases involving or growing out of labor disputes. *See* 29 U.S.C. § 52. It soon became apparent, however, that what was supposed to be the "charter of liberty of labor," Felix Frankfurter & Nathan Greene, The Labor Injunction 164 (1930) (remarks of William Howard Taft), fell short of the promise. The *Lochner*-era judges adopted a narrow interpretation of the Act, restricting it to "trade union activities directed against an employer by his own employees." *United States v. Hutcheson*, 312 U.S. 219, 230 (1941). "[T]o protect the rights of labor in the same manner the Congress intended when it enacted the Clayton Act," *id.* at 236, Congress passed the Norris-LaGuardia Act, under which "the allowable area of union activity was not to be restricted . . . to an immediate employer-employee relation." *Id.* at 231. Through its holding in this case today, the majority reaffirms the wisdom of the old French saying used by Felix Frankfurter and Nathan Greene when describing judicial reluctance to enforce § 20 of the Clayton Act: "the more things are legislatively changed, the more they remain the same judicially." Felix Frankfurter & Nathan Greene, The Labor Injunction 176 (1930). Despite the repeated efforts of the legislative branch to come to the rescue of organized labor, today's opinion puts the power of the Act in the service of employers, to be used against non-unionized employees who can no longer avail themselves of protections of labor laws. Because I cannot countenance such interpretation of the Act, I must and hereby dissent. . . .

CASE QUESTIONS

1. Must there be a duly certified union in order to have a "labor dispute" under the Norris-LaGuardia Act?

2. Did the "labor dispute" between the players and the League disappear when the players decertified as a union and elected to pursue the dispute through antitrust litigation rather than collective bargaining?

3. Did the court decide that the League's nonstatutory labor exemption from the antitrust laws continues even though the players decertified as a union?

CONGRESSIONAL ADJUSTMENTS. With the enactment of the Labor Management Relations Act of 1947 (Taft-Hartley Act) and the Labor-Management Reporting and Disclosure Act of 1959 (Landrum-Griffin Act) reflecting a public policy change, immunities from injunctive action afforded labor by the Anti-Injunction Act were substantially narrowed. Section 10(1) of the National Labor Relations Act allows the National Labor Relations Board to seek appropriate injunctive relief against unions in certain matters such as secondary boycotts and jurisdictional disputes.

SECTION 1:6 CONTINUING IMPACT OF ANTITRUST LAWS

The Labor Management Relations Act of 1947 embodies the congressional policy favoring bargaining as the best means of resolving disputes between employers and employees, thereby preserving economic stability and industrial peace. Labor law allows employees to form unions, which then act as the employees' exclusive bargaining representative. Unions and employers have a duty to bargain in good faith toward mutually acceptable agreements that cover wages, hours, and working conditions. Federal labor law also allows employers to band together with other employers in the same industry to form multi-employer bargaining units. Labor law, then, in facilitating the setting of the prices that groups of employers will pay for labor, would appear to be in conflict with the national antitrust policy favoring unrestricted economic competition and precluding the fixing of prices. To avoid this potential conflict, the Supreme Court has recognized a **nonstatutory labor exemption** that immunizes certain *results* of that bargaining process from antitrust attack. This nonstatutory exemption protects union-employer collective bargaining agreements dealing with wages, hours, and working conditions from being subject to antitrust law.

The nonstatutory exemption does not, however, exempt all agreements between unions and employers. In *United Mine Workers v. Pennington*,[12] the Supreme Court made clear that unions continue to remain subject to federal antitrust laws to the extent that a union joins with an employer group to eliminate other employers from the industry and to the extent that a union agrees with one set of employers to impose specified wage scales on other employer bargaining units.

In *Brown v. Pro Football, Inc.,* presented in this section, the Supreme Court recognized that the nonstatutory labor exemption can be applied where needed to make the collective bargaining process work. And it applied the exemption to shield football team owners from an antitrust attack for agreeing together as a multi-employer bargaining group to impose a set weekly salary figure of $1,000 per week on its 235 developmental squad professional football players after the employer group could not reach agreement on this issue with the players union. If there was no existing bargaining relationship with a union, the employers would not be able to collectively set the rates they would pay for the developmental squad members, and

[12] 381 U.S. 657 (1965).

a clear antitrust violation would have existed. Many agents of professional players would prefer that the football players union be decertified in order to destroy the nonstatutory exemption and bring about full free agency for players.

In the *Brady v. National Football League* decision, previously presented, the Eighth Circuit was very careful to point out that it did not address the question of whether the League's nonstatutory labor exemption from the antitrust laws continued once the players decertified their union.

CASE 1.7 BROWN V. PRO FOOTBALL, INC.

Supreme Court of the United States, 518 U.S. 231 (1996).

[After their collective bargaining agreement expired, the National Football League (NFL) and the NFL Players Association, a labor union, began to negotiate a new contract. The NFL presented a plan that would permit each club to establish a "developmental squad" of substitute players, each of whom would be paid the same $1,000 weekly salary. The union disagreed, insisting that the 235 individual developmental squad members should be free to negotiate their own salaries. When negotiations reached an impasse in June 1989, the NFL unilaterally implemented the plan. Anthony Brown of the Washington Redskins filed a class action antitrust suit, claiming that the employers' agreement to pay them $1,000 per week restrained trade in violation of the Sherman Act. A jury granted an award of $10 million to the class, which was trebled by the district court to a $30 million judgment for the players. The court of appeals reversed, holding that the owners were immune from antitrust liability under the federal labor laws. The matter was appealed to the U.S. Supreme Court.]

BREYER, J. . . .

Labor law itself regulates directly, and considerably, the kind of behavior here at issue—the postimpasse imposition of a proposed employment term concerning a mandatory subject of bargaining. Both the Board and the courts have held that, after impasse, labor law permits employers unilaterally to implement changes in preexisting conditions, but only insofar as the new terms meet carefully circumscribed conditions. For example, the new terms must be "reasonably comprehended" within the employer's preimpasse proposals (typically the last rejected proposals), lest by imposing more or less favorable terms, the employer unfairly undermined the union's status. . . . The collective-bargaining proceeding itself must be free of any unfair labor practice, such as an employer's failure to have bargained in good faith. See *Akron Novelty Mfg. Co.,* 224 N.L.R.B. 998, 1002 (1976) (where employer has not bargained in good faith, it may not implement a term of employment); P. Hardin, The Developing Labor Law 697 (3rd ed. 1992) (same). These regulations reflect the fact that impasse and an accompanying implementation of proposals constitute an integral part of the bargaining process. . . .

In these circumstances, to subject the practice to antitrust law is to require antitrust courts to answer a host of important practical questions about how collective bargaining over wages, hours and working conditions is to proceed—the very result that the implicit labor exemption seeks to avoid. And it is to place in jeopardy some of the potentially beneficial labor-related effects that multiemployer bargaining can achieve. That is because unlike labor law, which sometimes welcomes anti-competitive agreements conducive to industrial harmony, antitrust law forbids all agreements among competitors (such as competing

employers) that unreasonably lessen competition among or between them in virtually any respect whatsoever. . . .

If the antitrust laws apply, what are employers to do once impasse is reached? If all impose terms similar to their last joint offer, they invite an antitrust action premised upon identical behavior (along with prior or accompanying conversations) as tending to show a common understanding or agreement. If any, or all, of them individually impose terms that differ significantly from that offer, they invite an unfair labor practice charge. Indeed, how can employers safely discuss their offers together even before a bargaining impasse occurs? A preimpasse discussion about, say, the practical advantages or disadvantages of a particular proposal, invites a later antitrust claim that they agreed to limit the kinds of action each would later take should an impasse occur. . . . All this is to say that to permit antitrust liability here threatens to introduce instability and uncertainty into the collective-bargaining process, for antitrust law often forbids or discourages the kinds of joint discussions and behavior that the collective-bargaining process invites or requires. . . . The judgment of the Court of Appeals is affirmed.

It is so ordered.

JUSTICE STEVENS, dissenting. . .

In his classic dissent in *Lochner v. New York,* 198 U.S. 45, 75 (1905), Justice Holmes reminded us that our disagreement with the economic theory embodied in legislation should not affect our judgment about its constitutionality. It is equally important, of course, to be faithful to the economic theory underlying broad statutory mandates when we are construing their impact on areas of the economy not specifically addressed by their texts. The unique features of this case lead me to conclude that the Court has reached a decision that conflicts with the basic purpose of both the antitrust laws and the national labor policy expressed in a series of congressional enactments. . . .

Congress is free to act to exempt the anticompetitive employer conduct that we review today. In the absence of such action, I do not believe it is for us to stretch the limited exemption that we have fashioned to facilitate the express statutory exemption created for labor's benefit so that unions must strike in order to restore a prior practice of individually negotiating salaries. I therefore agree with the position that the District Court adopted below.

Because the developmental squad salary provisions were a new concept and not a change in terms of the expired collective bargaining agreement, the policy behind continuing the non-statutory labor exemption for the terms of a collective bargaining agreement after expiration (to foster an atmosphere conducive to the negotiation of a new collective bargaining agreement) does not apply. To hold that the non-statutory labor exemption extends to shield the NFL from antitrust liability for imposing restraints never before agreed to by the union would . . . infringe on the union's freedom to contract . . . .

CASE QUESTIONS

1. Identify the "non-statutory labor exemption" and explain its significance.

2. Did the non-statutory labor exemption from the antitrust laws expire upon the parties reaching bargaining impasse?

3. If the NFL Players Association decertifies, may NFL players bring suit against NFL owners for antitrust violations for the league's salary cap and employer-imposed uniform salary rates for developmental squad players?

CHAPTER QUESTIONS AND PROBLEMS

1. What three early common law doctrines were applied to labor organizations?

2. What is the present status of the so-called yellow-dog contract?

3. May the National Labor Relations Board obtain injunctive relief against unions in light of the Federal Anti-Injunction Act?

4. The National Electrical Contractors' Association (NECA) is a national trade association composed of electrical contractors. NECA negotiates a nationwide collective bargaining agreement with the International Brotherhood of Electrical Workers (IBEW). The electrical contractors who belong to NECA pay annual dues and a service charge in exchange for the benefits of being an NECA member. One such benefit is the single NECA labor agreement that covers the IBEW members employed by the electrical contractors. Approximately 50 percent of the electrical work in the United States is performed by NECA member companies, with the remainder being performed by non-NECA contractors who negotiate separately with the IBEW, employ members of other unions, or are nonunion.

NECA member companies realized that non-NECA companies had a competitive advantage over NECA contractors when they bid for jobs because they did not have to recover the cost of NECA membership in their quoted price. Therefore, IBEW and NECA placed a provision in their national agreement requiring that in any job involving a party to the agreement, the employer would pay one percent of its gross labor payroll into the National Electrical Industry Fund to be jointly administered by NECA and IBEW. Because the agreement was binding on all IBEW locals, its effect was to force non-NECA contractors employing IBEW members to pay into the fund.

Non-NECA contractors brought an action claiming that the industry fund provision constituted price fixing by NECA and IBEW, an antitrust violation under the Sherman Act. They requested an injunction against IBEW and NECA's agreement. IBEW and NECA argued that no injunction could be issued.

May an injunction be issued by a court against the NECA-IBEW agreement? If so, should an injunction issue in this case? Decide. [*NECA, Inc. v. National Contractors' Association,* 110 LRRM 2385 (4th Cir.)]

5. United Mine Workers of America, District 28, engaged in a protracted labor dispute with the Clinchfield Coal Co. and Sea "B" Mining Co. over alleged unfair labor practices. In April 1989, the companies filed suit in Virginia to enjoin the union from conducting unlawful strike-related activities. The trial court entered an injunction that prohibited the union and its members from, among other things, obstructing ingress and egress to company facilities, throwing objects at and physically threatening company employees, placing tire-damaging "jackrocks" on roads used by company vehicles, and picketing with more than a specified number of people at designated sites. The court additionally ordered the union to take all steps necessary to ensure compliance with the injunction, to place supervisors at picket sites, and to report all violations to the court.

On May 16, 1989, the trial court held a contempt hearing and found that the union had committed 72 violations of the injunction. After fining the union $642,000 for its disobedience, the court announced that it would fine the union $100,000 for any future violent breach of the injunction and $20,000 for any future nonviolent infraction.

In seven subsequent contempt hearings held between June and December 1989, the court found the union in contempt for more than 400 separate violations of the injunction, many of them violent. Each contempt hearing was conducted as a civil proceeding before the trial judge, in which the parties conducted discovery, introduced evidence, and called and cross-examined witnesses. The trial court required that contumacious acts be proved beyond a reasonable doubt, but did not afford the union a right to jury trial.

The court levied $52 million in fines against the unions and directed that the money be paid to the state and two of its counties. The union contends that the fines were criminal and could not be imposed absent a criminal trial. The state contends that the fine schedule was intended to coerce compliance with the injunction and therefore the fines were civil and properly imposed in civil proceedings. Decide. [*United Mine Workers of America v. Bagwell,* 114 S. Ct. 2552]

6. When the Strand Theatre of Shreveport Corporation's collective bargaining agreement with its union expired, the theatre refused to bargain with the union over a new contract. Under basic contract law, when a contract expires, the parties are free to make or not make a new contract; a new contract is not made unless there is assent to all terms by both parties. Was the theatre within its legal rights in choosing not to bargain with the union after the expiration of the collective bargaining agreement? Decide. [*NLRB v. Strand Theatre of Shreveport Corp.,* 493 F.3d 515 (5th Cir. 2007)]

7. On October 2, 2007, a federal district court jury awarded Anucha Browne Sanders, the former senior vice president of the New York Knicks basketball team, $11.6 million in punitive damages against the team's owner, Madison Square Garden; its chairman, James Dolan; and its president and head coach, Isiah Thomas. Browne Sanders was seeking an additional $9.6 million in compensatory damages at a subsequent trial stage. On December 10, 2007, the parties settled for what news media reported to be $11.5 million.

Ms. Browne Sanders said:

> The jury's verdict in this case sent a powerful and enduring message that harassment and retaliation at Madison Square Garden will not be tolerated. It is my hope that all women will be able to work in an environment that is free of discrimination and harassment, and that any woman who stands up for her rights will be taken seriously by her employer rather than retaliated against.

Madison Square Garden officials stated that they "vehemently disagree with the jury's decision," but settled the matter under pressure from NBA Commissioner Stern. Isiah Thomas stated that he was "completely innocent." Google Browne Sanders-Isiah Thomas sexual harassment trial and read the reported testimony and commentary. Do you believe that "the law" against sexual harassment in the workplace and retaliation against the victim reporting misconduct is complicated? Did the notoriety of this case have a "teaching effect" on all employers that harassment and retaliation should not be tolerated because it is harmful to victims and costly to the employers who allow such misconduct to exist? ["Post-Verdict Settlement Reached Former Knicks Executive's Case," DLR No. 238, A-12]